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IN THE

Supreme Court of the United States.

~~No. 628~~ 67

No. ~~628~~ OCTOBER TERM, 1907.

MRS. ANNIE E. PENMAN,
Defendant in Error and Petitioner,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff in Error and Respondent.

BRIEF OF RESPONDENT.

ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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MRS. ANNIE E. PENMAN,
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ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff in Error and Respondent.

ARGUMENT.

The only authority the petitioner has for asking the court to issue a writ of certiorari is in the provisions of Section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, which is in substance as follows: That any case in which the judgment of the Circuit Court of Appeals is made final may be required by the Supreme Court by certiorari or otherwise to be certified to it for review and determination as if it had been brought there on appeal or writ of error. In November, 1891, in construing this section Mr. Chief Justice Fuller, in delivering the opinion in the case of Lau Ow Bew, 141 U. S. 583, used the following language: "It is evident that it is solely questions of gravity and im-

portance that the Circuit Courts of Appeals should certify to us for instruction; and it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final to be certified can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error," and added, "While, therefore, this branch of our jurisdiction should be exercised sparingly and with great caution, we are of opinion that the grounds of this application are sufficient to call for our interposition." This was followed by the case of Woods vs. Lovejoy, 143 U. S. 202, in which the Chief Justice cited the Lau Ow Bew case as holding that the power of this court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final, to be certified for review and determination as if it had been brought here on appeal or writ of error, could only be properly invoked under the section above mentioned, when questions of gravity and importance were involved, and added, "This must necessarily be so in any view, and especially when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation which impede the examination and disposition of cases of public concern and delay suitors in the pursuit of justice. But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters."

In the case under consideration the court held that the matters involved did not fall within the category of questions of such gravity and general importance as to require

the review of the conclusions of the Circuit Court of Appeals in reference to them. The writ was therefore denied.

The court had this same question under consideration in the case of American Construction Company vs. Railway Co., 148 U. S. 372 (decided March 27, 1893), and Mr. Justice Gray in delivering the opinion of the court said: "In the same spirit, the authority conferred on this court," (by the section above mentioned), "has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision * * * * *. Accordingly, while there have been many applications to this court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted: the one in Lau Ow Bew's case above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in Fabre, Petitioner, * * * * which presented an important question as to the rules of navigation."

A later case is that of Forsyth vs. Hammond, 166 U. S. 506, (decided April 19, 1897). Mr. Justice Brewer delivered the opinion in which he referred to the previous decisions and said that up to the time of the passage of the act of 1891 the theory of Federal jurisprudence had been a single appellate court, to-wit: the Supreme Court of the United States. He referred to the rapid growth of the country and the enormous amount of litigation as having caused the creation of the nine circuits of an appellate tribunal composed of three justices whose decision in certain classes of cases applicable thereto should be final. While this revision of appellate power was the means adopted to reduce the accumulation of business in this court it was foreseen that injurious results might follow if an absolute finality of determination was given to the courts of appeal. Nine separate appellate tribunals might, by their difference of opinion, unless held in check by the

reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision.

Upon a careful consideration of the principles laid down in the citations above given it would seem that in order to induce the court to exercise the power to issue a writ of certiorari there must be some one or more of the following requisites:

First: Such radical differences of opinion between circuit courts of appeal as would create an unfortunate confusion in respect to the rules of Federal decision.

Second: Such differences of opinion between courts of appeal and the courts of a state or some matter affecting the interests of this nation in its internal or external relation which demand such exercise.

Third: These matters must be questions of great gravity and importance.

The third rule above mentioned qualifies the other two. The nine appellate tribunals would be more than human if they could harmonize with each other in all their decisions. In fact no courts have been able to harmonize all their own decisions. The applicant for a writ of certiorari, therefore, must show that the matter is of such importance that it calls upon the Supreme Court to intervene to prevent the unfortunate confusion above mentioned and that is why the court has said that it has been chary of action under the act of 1891 because otherwise the calendar of the court would be loaded down with business exactly as it had been before the passage of the act. This thought is expressed in another way by the Supreme Court in the same case, viz: "Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation."

It appears to us that there is still a further distinction in these opinions of the Supreme Court, viz: that the differ-

ences between United States Courts and the State Courts should not be mere opinions on abstract questions of law which might afterwards be cited as authority in the tribunals deciding the questions or in other tribunals, but that there must be some actual conflict or difference of opinion as to the exercise of jurisdiction in regard to the same subject-matter. For instance, in the case of Forsyth vs. Hammond (Supra) the Supreme Court of Indiana had declared, "that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal and, therefore, that the territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals by its decision in this case had declared that such annexation proceedings were invalid, and that the property of this petitioner was not within the city limits." This was evidently a concrete question and touched upon a very delicate and long disputed matter, viz: national and state rights. It is very clear, therefore, that the highest tribunal in the land should have the final decision in such matters, and it is a fair illustration of what the Supreme Court meant in speaking of matters of grave and weighty importance. Within the last few months there has been much friction between the state and national officials in one or two southern states over railroad matters, which might have resulted in bloodshed, and every consideration, therefore, in regard to the peace and dignity of national government, as well as the state authorities, would require that such matters should be referred to the court possessing the highest authority. But we have not heard of any uprising on the part of the populace, or of either of the state or national officials, because the Circuit Court of Appeals of the Third Circuit rendered a decision in the case at bar which might possibly be in conflict with some opinion handed down by the Supreme Court of the State of Pennsylvania. We are speaking by way of illustration because we deny that there was any such conflict, and aver that the plaintiff's brief has not proven that there was.

Indeed, as we think, if the court had decided otherwise than it did, it would have brought itself into conflict with the Supreme Court of the United States. But if it had, we would be obliged to concede that we would have been remediless, because we believe that no writ of certiorari could have issued for our benefit.

It seems to us that the case at bar does not exhibit any of the requirements above mentioned. It was a case between private parties, and of no public interest whatever, involving the construction of a clause in a policy of insurance of the standard form. This form of policy contains stipulations and conditions covering one hundred and twelve printed lines and it may be said that their name and the name of the decisions bearing thereon is literally legion. If this court is to grant a writ of certiorari in every instance in which any Circuit Court of Appeals should in its decisions differ from any similar court, or any state court, in regard to the proper construction of the standard policies of insurance as to any one or more of the conditions or stipulations thereof, then the beneficial effect of the act of 1891, so far as relief to the Supreme Court is concerned, would be entirely lost.

So far we have not touched upon the merits of the case at bar. The counsel for the petitioners seem to think that the fact that there was a dissenting opinion in the Court of Appeals is a proper warrant for the granting of the writ. In a case of sufficient gravity and importance which was public in its nature and contained the other elements above mentioned, no doubt the fact that there was a dissenting opinion would have weight with the Supreme Court, but where these elements are lacking, the dissenting opinion of a District judge sitting as a member of the Circuit Court of Appeals, would not be entitled to any more weight than the opinion of the learned judge of the Circuit Court whose judgment was reversed by the Circuit Court of Appeals. To take any other position would be to assert that in every case where there was a reversal there was a difference of opinion between the appellate

court and the court of inferior jurisdiction, which would warrant the issuing of a certiorari. To state this proposition is to answer it.

It is hardly worth while in a brief of this character to discuss the merits of the case under consideration except in so far as the same might have a bearing upon the matters heretofore presented. The petitioner's counsel in their brief have presented nine different points. Of these the second, fourth, sixth, eighth and ninth appear to us to be immaterial. We have already endeavored to answer the first, third and seventh, and will try to reply to the fifth hereafter. In regard to the eighth point we admit the large number of citations, but deny their relevancy.

Our case may be briefly stated as follows:

First: The policy of insurance (vide page 7 of the record) contained the following clause *inter alia*:

> "Mrs. Annie E. Penman $2600.00 on a two-story frame, shingle-roofed building 28x96 and additions, now in process of erection, with privilege to finish, *to be occupied by tenants as dwellings*, situate in Elk Run Addition to Punxsutawney, Elk County, Pennsylvania." * * * * "In consideration of an extra premium of $3.90, 30 days' permission is hereby granted to finish building."

It will be observed that the policy showed upon its face that the building was not yet finished and that it was to be occupied by tenants as a dwelling. The testimony showed that it was not rented at the time nor for some time afterwards, that neither the agent nor any other person knew who the tenant was to be, or what his occupation might be, and yet the petitioner claimed in the trial court that the agent of the company was presumed to know that the tenant would be a miner because it was in a mining district, and if perchance he should happen to be a miner that he would follow the pernicious and dangerous custom of other miners of keeping blasting powder upon the premises. (See pages 69, 75, 76 and 77 of the record). In this there was an attempt to base a presumption upon a presumption which the law will not permit. In the case of Douglass

vs. Mitchell's Executors, 35 Pa., 440, the Supreme Court of Pennsylvania held that "whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves presumed. No presumption can be drawn from a presumption; if there be no fixed or ascertained fact from which the inference of another fact may be drawn, the law permits none to be drawn from it." To the same effect is Philadelphia City Pass. Ry. Co. vs. Henrice, 92 Pa., 431.

Second: The appellate court held that the trial court had erred in admitting parol testimony to vary the terms of the policy. (See majority opinion p. 117 of the record). The decision of the court in this respect was based upon the case of Assurance Co. vs. Building Association, 183 U. S. 308.

Third: The clause in the policy in relation to the proper construction of the words "or other explosives" is so well discussed in the majority opinion on pages 115 and 116 of the record that nothing further needs to be said by us. We desire to call attention, however, to the fact as shown in the testimony of Frank Moronose, on page 51 of the record, that immediately before the explosion took place which caused the fire, there were three men engaged in taking blasting powder from as many open kegs in the dwelling house and putting it in tubes for use in the mines and the tenant and the other men were throwing lighted caps or squibs in the air for fun, when one of them fell into an open keg causing an explosion killing four persons and setting fire to the house. The witness himself was so badly burned that he barely escaped with his life. We are unable to see that the plaintiff's petition or the facts as shown in the record or in the majority opinion or the dissenting opinion disclosed any matters of sufficient gravity or importance to lead the court to order a certiorari to be issued.

Respectfully submitted.

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D. C. JENNINGS,
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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 67.

MRS. ANNIE E. PENMAN,
Petitioner,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 67.

MRS. ANNIE E. PENMAN,

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vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

This was an action at law brought to recover upon a policy of fire insurance as written. The policy contained the following specification or description of the property insured:

> "$2,600.00.
>
> On the two-story, frame, shingle roof building, 28x96 feet and additions, now in process of erection, with privilege to finish, *to be oc-*

cupied by tenants as dwellings, in Elk Run Addition to Punxsutawney, Jefferson County, Pennsylvania.

Permission to use natural gas for fuel and lights.

Lightning clause attached.

Loss, if any, first payable to Louis Wester, as his interest may appear.

In consideration of an extra premium of three and 90/100 dollars, thirty days' permission is granted to finish building" (p. 5).

The policy was a printed form commonly known as the New York Standard Form, and in use in the State of Pennsylvania. It contained the following provision:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * (any usage or custom or trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gun-powder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorous or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be had for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by day-light, or at a distance not less than ten feet from artificial light)" (p. 67).

The policy also contained the following provision:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agree-

ments or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached" (p. 10).

The defense was based on a violation of the clause prohibiting the keeping, using or allowing of explosives upon the premises.

It was conclusively established by the evidence that some of the tenants were miners; that for some months prior to the fire they habitually kept kegs of blasting powder upon the premises; that at the time of the explosion which resulted in the destruction of the property at least three open kegs of blasting powder were in one of the rooms where the men were engaged in filling flasks with the powder to be taken into the mine. One of the men was amusing himself by lighting squibs or fuses and throwing them into the air, and one of the lighted squibs fell into one of the open cans of powder. The result was an explosion (p. 35-39). As the powder was not confined, the concussion was not particularly violent, but was noticeable by outsiders at some distance from the building (p. 15, 17, 22). The ignition of this large

mass of loose blasting powder burned to death four of the occupants of the room and the building instantly burst into a mass of flames (p. 37).

It will be noted that the policy by its terms does not state that the building was to be occupied by miners. Also that at the time of the issuance of the policy the building was not occupied or used for any purpose, being then in the course of erection.

It conclusively appears that blasting powder is a substance manufactured and used for the sole purpose of rending apart substances by its explosive force, that one of its uses is blasting in coal mines (p. 62), and that it is recognized as a dangerously violent explosive by the laws of Pennsylvania, which prohibit miners from taking more than five pounds into the mines (p. 44). Against the objection of the respondent the trial court admitted parol evidence to establish the meaning of the policy provision prohibiting explosives. The agent who had written the policy was permitted to testify (p. 47-55), that although nothing was said on the subject, he "knew" or rather supposed that it was the intention of the assured thereafter to rent the property to miners, apparently because the building was of a kind suitable for miners' tenements and because the residents in the neighborhood were principally (p. 54,) though not all, miners. He was also permitted to testify that he had increased the premium, partly because of the fact that there seven separate families were to live in the building (p. 52), and partly because

he supposed they would be miners. He was wholly unable to say what part of the increase was for one hazard and what part for the other (p. 53). This testimony consisted wholly in a description of his own undisclosed mental operations, divulged neither to the insured (p. 53) nor to the Insurance Company (p. 54). Proof was further permitted to show that it is a common practice of miners to keep considerable quantities of blasting powder in their dwellings, because on account of the dangers incident to its presence, the law prohibits taking it into the mines in quantities exceeding five pounds (p. 44). The trial court abdicated its functions (p 66) and allowed the jury to determine what the contract was, with the result usual in insurance cases. The Court of Appeals held that a verdict should have been directed for the defendant.

The questions for decision are whether blasting powder was prohibited by the provisions of the policy, and whether parol evidence was admissible to show that the parties intended to permit its use upon the premises.

ARGUMENT.

TO KEEP, USE OR ALLOW BLASTING POWDER UPON THE PREMISES WAS CLEARLY PROHIBITED BY THE TERMS OF THE WRITTEN CONTRACT.

The decisive point in this case is whether the contract, as written, prohibited blasting powder upon the premises.

Blasting powder is not specifically named in the policy, and the question is whether an explosive of that character was included in the expression "other explosives."

The theory of the petitioner and of the dissenting opinion in the court below is that because it was shown that blasting powder was of a lower degree of explosive force than gun powder (p. 62), it was not included within the term "other explosives", this result being obtained by an attempted application of the rule *ejusdem generis*, from which it is claimed that by "other explosives" was intended only explosives having the same degree of explosive force as those specifically mentioned. This argument ignores the manifest purpose of the prohibitory clause and is based on too narrow a view of the rule of interpretation mentioned. In interpreting this contract the first step is to determine from the nature of the contract the purpose for which this provision was inserted. It is manifest that the Insurance Company intended to relieve itself from those risks incidental to the presence of explosive substances of such a

character as to be seriously dangerous to life and property. Any substance, therefore, of sufficiently violent explosive properties to cause a substantial increase in hazard is within the plain purpose of the provision. That blasting powder is a substance with such qualities is made plain not only by such description of its properties as is contained in the record, but by the undisputed fact that in this particular case ignition of a quantity of the powder in a loose and unconfined condition destroyed the lives of four people and resulted in the instant destruction by fire of the insured building (p. 37, 38). The term "other explosives" was plainly intended to include substances with these qualities. A proper application of the rule *ejusdem generis* to the provisions of this contract is necessarily favorable to the respondent. A number of different explosive substances are specifically named in the contract. These substances differ greatly in their chemical qualities, and in the degree of their explosive force. Some of them are manufactured for the sole purpose of causing explosions. Others are manufactured or used for other purposes, but have the quality of causing explosions if not properly handled. The only characteristic common to all the substances specifically named is that they are liable to cause more or less violent explosions, dangerous to life and property.

It is manifest, too, that a difference in degree of explosive force is not important, provided the article will produce explosions sufficiently violent seriously to increase the hazard. Nitroglycerine, gun

powder and greek fire differ widely in the degree of explosive force which they possess, and yet are prohibited for the manifest reason that they have sufficient explosive force to cause substantial danger to life and property and seriously to increase the hazard. The rule *ejusdem generis* is a rule of interpretation intended to aid the court in arriving at the true intention of the parties, and not to pervert the fair meaning of a written instrument. No proper application of it can lead to the conclusion that the general expression "other explosives" was intended to include only explosive substances having substantially the same as or a greater degree of explosive force than gun powder. Its proper application in this case would lead simply to the conclusion that by the term "other explosives" was meant explosives having the same general characteristic as those specifically named, viz., sufficiently violent explosive force to cause substantial injury to property and seriously to increase the hazard. The further fact that the substances specifically named have varying degrees of explosive force indicates that the term "other explosives" was not intended to be limited to substances having the same degree of explosive force as any one of those specifically named. The authorities cited in support of the petitioner's attempted application of the rule *ejusdem generis* do not sustain it.

For example, in the case of Renick v. Boyd, 99 Pa. St. 555, an act of the legislature enabled an owner of realty to sustain an action of replevin to recover "timber, lumber, coal or other property

severed from the realty." The court held that the words "other property" were intended to include articles of the same generic character as those already enumerated, such as slate, marble, iron ore, zinc ore, all other forms of minerals and ores, building stone, fixtures and machinery of every description, which have been permanently affixed to the realty. We submit that there is as much similarity between blasting powder and dynamite as there is between timber, lumber and coal on the one hand, and zinc ore, building stone or machinery on the other. This case shows that the rule *ejusdem generis* means that a general expression following a specific description of articles includes other articles having the same general characteristics as those specifically named. The general characteristic common to the articles specifically prohibited in this policy is that of having sufficient explosive violence to cause substantial damage to life and property, a characteristic which it cannot be disputed belongs to blasting powder. Three classes of explosives are specifically mentioned in the policy:

1. Substances manufactured for the purpose of propelling missiles from fire arms by explosive force.

2. Substances manufactured for the purpose of rending apart other substances by explosive force.

3. Substances manufactured or used for commercial, domestic or manufacturing purposes, which incidentally have dangerous explosive properties.

"Other explosives," therefore, properly includes substances belonging to any one of these classes.

The most narrow construction which could be placed upon the words "other explosives" as used in this policy is that the expression was intended to include only articles manufactured and used for the purpose of causing explosions,—what might be termed explosives *per se*. One definition of the word "explosive" is as follows:

> "Any substance by whose decomposition or combustion gas is generated with such rapidity that it can be used for blasting or in fire arms."
>
> Century Dictionary, Explosive.

Blasting powder comes within this very limited definition. It is an article manufactured and used solely for the purpose of causing explosions and of rending apart masses of rock, earth, coal or similar substances. It must be a violent explosive to be efficient for the purpose for which it was intended. It has been recognized as a high and dangerous explosive in the statutes of the State of Pennsylvania. The statute of Pennsylvania of May 15, 1893, relative to bituminous coal mines, Art. 8, Sec. 5, P. L., provides:

> "No powder or high explosive shall be stored in any mine, and no more of either article shall be taken into the mine at any one time than is required for any one shift, unless the quantity be less than five pounds."

It appears from the evidence that the very article which caused the destruction of this building is the explosive referred to in this statute of Penn-

sylvania (p. 44). It has been recognized by law as a substance so dangerous to life and property as to require the exercise of the police power of the Commonwealth of Pennsylvania to limit its use in the mines of that state. It conclusively appears, therefore, that blasting powder is an "explosive" in any sense in which the word may be used; also that it is an extremely dangerous explosive with sufficient explosive force to rend apart masses of rock, earth or coal, and that it therefore necessarily has those qualities common to the explosives specifically named in this policy, and that it comes within the plain purpose of the prohibitory clause in the contract. That the words "other explosives" include only substances manufactured or used to cause explosions is, however, too narrow and limited an interpretation to be placed upon these words. A much broader meaning has been given to this expression by the Supreme Court of Pennsylvania.

In the case of Lutz v. Royal Ins. Co., 205 Pa. St. 159, a policy containing the same provision as the policy here involved was issued covering a building occupied by a dealer in photographic supplies. The dealer was not only selling but manufacturing blitz pulver, a flash light powder used in photography. The defense rested on the claim that flash light powder was an explosive prohibited by the policy, although not specifically named. The evidence showed merely that flash light powder was a violent explosive, dangerous to life and property. There was no proof that blitz pulver was

of any greater or less degree of explosive force than other substances specifically named in the contract, and no comparison was made or attempted to be made between its explosive qualities and that of other articles specifically named or specifically prohibited. It is manifest, further, that flash light powder is not manufactured for the sole purpose of causing explosions. In this state of the case the Supreme Court of Pennsylvania held that flash light powder was included in the expression "other explosives" on mere proof that it was likely to cause explosions dangerous to life and property, without any reference to a comparative degree of explosive force.

In United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, the policy provided that the insurer should not be liable for loss resulting from any explosion whatever, "whether of steam, gunpowder, camphene, coal oil, gas, nitroglycerine, *or any explosive article or substance.*" If the application of the rule *ejusdem generis* urged by the petitioner be sound, then no explosive article or substance not specifically named in the limitation of liability came within the limitation, unless shown to be of as great explosive force as those named, and yet the Court held that the insurer was not liable for loss caused by an explosion of vapor evolved in the rectification of liquor, *although the policy expressly authorized* the use of the premises for that purpose.

In the dissenting opinion much is made of the

fact that not exceeding twenty-five pounds of gun powder were permitted by the terms of this contract, and it is urged that as blasting powder was shown to have a less degree of explosive force than gun powder, blasting powder was not intended to be prohibited. Such an inference is not justified. The reasons for permitting limited quantities of gun powder, even though it be of a higher degree of explosive force than other prohibited articles, is manifest. Gun powder may be said to be a common household article throughout the United States. It is found in some form or other in almost every household. The people are familiar with its qualities and accustomed to its use, and use it only in particular ways, and for those reasons it may in reality be less dangerous than other forms of explosives having less explosive force. The presence of a limited quantity of gun powder, therefore, is almost a necessary risk to be assumed. A company could not do business without permitting it, and it is to be presumed that it is one of the risks which enter into their calculations. The fact, therefore, that they are willing to assume such risk under these circumstances does not justify the inference that they intend to assume the risk incident to the presence of blasting powder, or other explosives of less explosive force than gun powder.

In every state are found statutes regulating or prohibiting the keeping of explosives. These statutes define what is meant by explosives, and usually except gun powder. One such statute defines

"explosive" as follows:

> "Guncotton, nitroglycerine, or any compound thereof, and any fulminate, or any substance intended to be used by exploding or igniting the same, to produce a force to propel missiles or to rend apart substances, except gunpowder."
>
> 1 Mass. Rev. Laws 1902, p. 880, c. 102, sec. 105.

Another as follows:

> "Guncotton, nitroglycerine, or any other compound of the same; any fulminate or generally any substance intended to be used by exploding or igniting the same to produce a force to propel missiles or to rend apart substances, except gunpowder."
>
> S. C. Civ. Code 1902, sec. 2156.

Such statutes therefore use the word "explosive" as including blasting powder. The reasons for the prohibition of explosives by such statutes are the same that move insurance companies to prohibit them in their policies. It will be noted also that these statutes except gunpowder, manifestly for the same reason that insurance companies do, not because it is not a violent explosive, but because people insist on having it. In a criminal prosecution under one of these statutes for keeping blasting powder, the defense that the statute did not include blasting powder because of lower degree of explosive force than gun powder, a permitted article, would not be tolerated, even under the strict rules of interpretation applied to criminal statutes.

It appears, therefore, that the word "explosive," as used in statutes intended to cover even a more limited class of explosive substances than the prohibition in the insurance policy, commonly includes blasting powder; also, that although gun powder is not prohibited by these statutes, explosives of less power are prohibited.

It is suggested in the dissenting opinion (p. 85) that as the policy contains a provision that in case of explosion the company shall only be liable for loss resulting from ensuing fire, thus contemplating the possibility of explosion, the inference follows that the company expected that explosives would be kept or used, and therefore blasting powder was permitted. The policy, however, does permit certain explosives such as gun powder in limited quantities, and natural gas, and it may be assumed that explosions might occur from the use of these articles, or from other substances not prohibited.

There is nothing in the description of the property of the insured, nor in the uses to which it was to be put as stated in the policy, which in any way could be construed as a permission to use blasting powder on the premises. The policy did not state that the building was to be occupied by miners or that it was to be occupied by miners who should have the right to follow their usual custom and keep substances common to miners upon the premises. It merely stated that the building was to be used by tenants as dwellings. To hold, therefore, that this contract did not prohibit the keep-

ing, using or allowing of blasting powder upon these premises is to hold that any such policy which permits the use of an insured building as a tenement house, regardless of the class of tenants, authorizes or allows the use of blasting powder.

It will be noted that the use of natural gas was not specifically prohibited by the policy. If prohibited at all it would be so by reason of a prohibition against "other explosives." Notwithstanding that fact the parties deemed it necessary to attach a special permit authorizing the use of natural gas for fuel and lights (p. 5). We assume that natural gas is an article of common use in this locality, and yet having explosive qualities it was felt necessary to expressly permit it in order that it might not be held to be a prohibited article. If the parties intended by this contract to permit the use of blasting powder upon the premises, a simple and easy method of accomplishing that result would have been to do what was done in the case of natural gas, and attach a permit so to do.

The prohibition against the use of explosives is that explosives are prohibited

> "unless otherwise provided by agreement endorsed hereon or added hereto."

The contract plainly contemplated that such permission must be endorsed on or added to the policy if it were intended to use such articles. This might have been done either by a provision specifically mentioning blasting powder or by a statement in the policy that the building was to be used by miners as tenants, with the right to keep and use

such articles as are usual for miners to use. This, while general in its terms, would have been a sufficient permit, contemplated by the policy, and if followed by proof that it was a common practice among miners to keep blasting powder in their dwellings would have prevented this policy from being declared invalid.

It was conceded that a violation of the conditions of this policy by a tenant would have the same effect as a violation by the insured.

Liverpool & London Ins. Co. v. Gunther, 116 U. S. 113;

Diehl v. Ins. Co., 58 Pa. St. 443.

It is also the law that the words "keep, use or allow," include even a single temporary presence of the prohibited article.

Heron v. Phœnix Ins. Co., 180 Pa. St. 257.

We submit that the only interpretation of which this policy is susceptible is that blasting powder was an article included within the words "other explosives," and was intended to be prohibited unless a permit to use or keep it was endorsed on or added to the written contract.

The argument that no other Court has held blasting powder to be an "explosive" within the meaning of this form of policy, leads only to the conclusion that in no other case have counsel had the temerity to claim that it was not.

II.

EXTRINSIC OR PAROL EVIDENCE WAS NOT ADMISSIBLE TO ALTER THE MEANING OF THE CONTRACT AS WRITTEN.

It has been held in some states that if at the time of the issuance of a policy conditions exist which, under the provisions of the policy as written, operate to make the contract void *ab initio*, evidence will be received to show that such conditions were known to the insurance agent at the time of the issuance of the policy, for the purpose of establishing a waiver or estoppel. There was at one time a conflict between the rulings of the Circuit Court of Appeals on that question, and as a result of that conflict this Court caused a writ of certiorari to be issued in the case of Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, and after an exhaustive examination of the question on principle and authority it was held by this Court that such evidence was not competent, and that its effect was to vary the terms of a written instrument by parol evidence. This Court in summing up its conclusions in that case said:

> "That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the Courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insur-

ance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, expres the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that he agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

That decision has since been universally followed by the federal Courts and quite generally followed by state Courts. If it is not permissible to introduce parol evidence to show the existence of facts and conditions known to the agent at the time of

the issuance of the policy, how much more reason there is for excluding parol evidence of a supposition on the part of the agent that the insured probably intends, at some future date, to commit or suffer some act violative of the provisions of the policy. The decision in the Northern Assurance Company case goes much farther than it is necessary to go to sustain the contention of the respondent in the present case. Parol evidence introduced in this case for the purpose of showing the intention of the parties outside of the written contract was not to the effect that present conditions existed, nor that blasting powder was in fact being used at the time the policy was issued, nor that the premises were in fact occupied by miners at the time the policy was issued, to the knowledge of the agent. The man who had acted as agent in the issuance of the policy was permitted to testify that he knew that when the building was thereafter completed it was to be occupied by miners, and that he knew it was the practice of miners to keep blasting powder in their dwellings, and for that reason added an extra premium for the risk. This witness testified on direct examination that he knew the building was to be so used. On cross-examination it appeared that this was a mere supposition on his part (p. 53). The insured did not inform the agent of the use to which the building was to be put. Nothing was said on the subject at the time of the issuance of the contract (p. 53). As the witness himself said, the fact that the premises might thereafter be used as a miners' dwelling did

not "enter into our calculations." It appears that the building insured was suitable for the occupation of miners, as well as for other classes of tenants; that it was located in a mining town in the vicinity of a mine, where residents were "principally" miners (p. 54), but it does not by any means appear that it was necessary to rent to miners, or that there were not any tenants of other classes available. It may be assumed that in connection with the operations of a mine there are necessarily large numbers of laborers, who do work other than the extraction of coal from the shafts (p. 47, Folio 66). It affirmatively appears that neighbors in the vicinity of this dwelling were not miners (p. 17), and so far as the evidence showed only three of the occupants of the premises were in fact employed in the extraction of coal (p. 36, 44) and one of the men who were in the room at the time of the explosion was working on the railroad (p. 35). The agent testified as follows:

"Q. Who told you that that property was to be occupied by miners?

A. I knew it.

Q. How did you know it?

A. I knew it from my experience in the business.

Q. By your own intuition, did you know it?

A. Well, yes.

Q. Mrs. Penman didn't tell you?

A. No, sir.

Q. You made no bargain with her?

A. No, sir.

Q. You didn't tell her that you increased the rate because she might possibly have that occupied by miners?

A. I didn't talk to Mrs. Penman at all.

Q. To whom did you talk?

A. To her husband, and Mr. Truitt, his attorney.

Q. Did Mr. Penman talk to you about whether or not that rate was to be increased because it was occupied by miners?

A. I don't think he did. I don't think that entered into our calculations" (p 53).

In short, this witness was permitted to testify as to a supposition on his part that the premises to some extent, at least, were probably to be used for miners' dwellings. It does not even appear that the insured at the time of the issuance of the policy intended to rent to miners. For all that appears she may have then intended to select her tenants so as to avoid the risks incident to this class of tenants.

Again, the witness Brown was permitted to testify that on account of his supposition as to the probable use of the premises, he added an extra premium. This testimony, like the other, is subject to severe criticism on its face. On cross-examination he was utterly unable to explain what additional premium was added for the supposed miners' risk. He admitted that a part of this increase, at least, was made on account of the fact that the building contained seven independent dwellings for seven independent families, and that the hazard would be increased on this account whether or not occupied by miners (p. 52). How much of this increase was added because of the number of families and how much was added on account of the fact that he supposed the occupants

would be miners he could not state (p. 53). This testimony is extremely unsatisfactory from every view point. The attitude of this witness is very similar to that of the insurance agent in the case of Kenefick v. The Norwich Union Fire Ins. Society, 205 Mo. 294, in which case, in commenting upon the testimony of the insurance agent given in favor of the plaintiff, the Court said:

> "The agent tried very hard to swear that he knew powder was kept upon the premises."

The testimony amounted to nothing more than a declaration of the undisclosed mental processes of the agent at the time of the issuance of the policy.

There is no case in the books in which a witness was permitted to explain or vary the language of a written contract by stating what he supposed in his own mind the parties intended to do. There are cases where policies of insurance definitely stated on their face that the insured premises were to be used for a particular purpose, and in such cases evidence has been admitted to show that if the building were used for the purpose stated in the policy certain substances would necessarily or customarily be used upon the premises.

In the case of Phœnix Ins. Co. v. Taylor, 5 Minn. 492, the policy prohibited the keeping of gun powder in the insured premises unless by special consent in writing on the policy. The rider attached to the policy describing the premises and insured property stated that the policy covered the stock of goods consisting of a general assortment of dry

goods, groceries, crockery, boots and shoes, and "such goods as are usually kept in a general retail store," and the Court held that it was proper to admit evidence to show that gun powder was usually kept in a retail store, and that therefore the rider attached to the policy was a sufficient consent in writing attached thereto to authorize the keeping of gun powder. In that class of cases, however, the policy itself provided for a definite use of the premises, and the only extrinsic evidence offered was that the use specified in the written contract necessarily or usually involved the keeping of certain articles. Western Assurance Co. v. Rector, 85 Ky. 294, 3 S. W. R. 415.

In the present case the parol evidence went still further. The plaintiff attempted to go outside of the policy to establish two facts, first, that the premises were intended to be used for a purpose not stated in the policy, viz., for miners' dwellings; and second, that it was the common practice of miners to keep blasting powder. There is no Pennsylvania case which holds that evidence may be introduced outside of the written contract for the purpose of showing *both that the premises were intended to be used for a purpose not specified in the contract and that such use necessarily or customarily involved the keeping of certain articles upon the premises.*

In the case of Citizens Ins. Co. v. McLaughlin, 53 Pa. St. 485, cited on behalf of the petitioner, it was expressly stated in the policy that the in-

sured buildings were to be used as a "tannery and patent leather manufactory." The policy contained a provision permitting the keeping of benzol in bulk in a small shed detached from all other buildings, but nowhere else on the premises. It was shown that the use of benzol in small quantities was absolutely essential to the manufacture of patent leather, and that small quantities were for that purpose brought into the factory daily from the outside storage place. It was, therefore, held that as the policy expressly authorized the use of the building as a tannery and patent leather manufactory, and as such use necessarily involved the presence of small quantities of benzol, the policy was not invalidated by such necessary use.

In the case of McKeesport Machine Co. v. Ben Franklin Ins. Co., 173 Pa. St. 53, the policy on its face authorized the use of the insured building as a foundry, machine shop and blacksmith shop. By its terms it covered patterns while contained in the pattern shop. A fire occurred in the foundry, destroying some patterns which had been taken there from the pattern shop for use in making moulds. It was shown by evidence that it was essential to the conduct of the business that the patterns should from time to time be used in the foundry, and that the foundry could not be operated without them. It was, therefore, held that such a temporary location of the patterns was contemplated and that such patterns as were temporarily taken into the foundry for this purpose were covered by the policy.

In Lancaster Silver Plating Co. v. National Fire Ins. Co., 170 Pa. St. 151, the written specifications attached to the policy expressly provided in effect that the premises were to be used as a silver plating shop. The printed portion contained a general clause prohibiting the presence of gasoline. It was shown by the evidence that the use of gasoline was *necessary* in carrying on the business of silver plating, and it was therefore held that gasoline might be used in such quantities as were necessary in the business.

In the case of Lutz v. Royal Ins. Co., 205 Pa. St. 159, the policy expressly provided as follows: "Premises to be occupied as at present, or for purposes not more hazardous." It appeared that at the time the policy was issued, a part of the premises were occupied by a dealer in photographic supplies. It was proven that it was customary for dealers in photographic supplies to put up and sell in small packages flash-light powder, but that it was not customary for dealers to manufacture it on the premises. The Court said that as the policy authorized the occupancy of the building by a dealer in photographic supplies and the use of the building for that purpose, that such express provision attached to the policy authorized the customary selling of flash-light powder. The Court, however, proceeded to hold further that as the manufacture of flash-light powder was not a customary use, it was unauthorized, and a flash-light powder was an explosive within the meaning of the contract the policy was void.

In speaking of the two cases in the 53rd and the 170th Pennsylvania Reports above cited, the Court said:

> "We think there is a clear distinction in the facts between those cases and this. In both cases cited, one a leather factory, the other a silver plate factory, the prohibited articles benzol and gasoline were in constant use in the manufacture of the product of the factories, and absolutely necessary in small quantities in carrying on the business. We hel that if the use was a necessary one in carrying on the business it must be presumed that the intent of the parties was to insure the subject of the contract as it then existed, and as it would continue to be during the life of the policy notwithstanding the printed condition."

Decisions of this character may be justified on one of two grounds: First, if the written portion of the policy specially attached at the time of its issuance authorizes in specific language or in general terms articles prohibited by the printed portion, and thus conflict with the printed form, the written portions override the provisions of the printed form. Or if, as is now usual, the prohibition as to the keeping of certain hazardous substances is conditioned upon there being no provision permitting them endorsed on or added to the policy, the written specification authorizing a special use of the premises involving the use of certain substances is properly held to be such an endorsement or addition as is contemplated by the printed provision. It must be apparent that there is a wide difference between the cases cited and the case at bar. If the policy here involved had con-

tained a provision that the insured premises were to be used as miners' dwellings, and this had been followed by proof that it was a necessary and essential part of the occupation by miners that blasting powder should be kept upon the premises, the Pennsylvania cases would apply; or if the policy had contained a provision that the premises were to be occupied by miners with the right to keep such substances as miners usually keep, or if the premises had been in fact occupied by miners at the time the policy was issued, and as in the Lutz case the policy had contained an endorsement or attachment permitting the continued use for the purposes for which it was then in use, it may be that under Pennsylvania decisions, evidence would be admitted to show the custom of miners. But the policy here involved does not contain any endorsement or addition authorizing the use of this dwelling for miners, nor does it contain any endorsement or addition, even in general terms authorizing any use of the premises which customarily or necessarily involves the presence of blasting powder. The language of the policy is that it is to be used by tenants as dwellings, and we do not believe it will be claimed that it is either necessary or customary for tenants generally to keep blasting powder in their dwellings. This policy contained a provision which, properly read, prohibited the keeping or use of blasting powder upon the premises. It contained an express provision requiring that before such use should be permitted a permit must be endorsed on or added to the policy

in writing. It contained a further provision notifying the insured that no agent of the company had authority to consent to the keeping of any prohibited articles except by a written endorsement on or addition to the policy, and that the insured would claim no such privilege unless endorsed on or added in writing. There was absolutely nothing upon the face of the contract to warn this insurance company that it was consenting to the keeping of blasting powder upon the insured premises. There was nothing upon the face of the policy to indicate that it was being used as a miners' dwelling. For all that appears a risk of this kind may have been with this company a prohibited risk. It was shown by the evidence that the agent in no way notified the company of the use to which the building was afterwards put (p. 54). He testified that at some date not specified he told a special agent of the company that he had added to the premium on account of the proposed occupation by miners. It does not appear what the authority of this special agent was, or that the building was in fact being used at that time as a miners' dwelling, and in any event the special agent would have no greater authority to waive any conditions of the policy without a written endorsement than would the agent issuing the policy.

There is a statement in the dissenting opinion (p. 90) that this agent had been for some time insuring miners' tenements in this vicinity on behalf of this respondent. There is no basis in the record for this statement. The agent represented

a number of companies, but he did not testify that he had ever written a miners' risk for the St. Paul Fire and Marine Insurance Company. If he ever did so, it is quite plain from his testimony that the insurance company was not aware of the fact.

It is suggested in substance in the dissenting opinion in the Court below, that because blasting powder was not specifically prohibited, parol evidence was admissible to show that it was not intended to prohibit it. This is a somewhat novel doctrine. This policy either prohibited blasting powder or it did not. If it did prohibit it, then parol evidence was inadmissible to alter the contract in this respect whether the prohibition was in general or specific language. The contract as written is not obscure, there is no latent ambiguity requiring extrinsic evidence to explain, and there is no room for construction. We submit that this case not only comes within the rule stated in the Northern Assurance Company case, but that it is not necessary to go as far as the holding in that case, in order to sustain judgment for the respondent.

III.

THE QUESTION IN THIS CASE IS NOT GOVERNED BY THE DECISIONS IN THE STATE OF PENNSYLVANIA.

It is claimed by the petitioner that the law in force in the State of Pennsylvania forms a part of this contract and must be followed by this Court, and that the law in the State of Pennsylvania is that this policy as written did not prohibit blast-

ing powder. There are two answers to this contention

1. The principle involved is not a rule of substantive law, but a rule of evidence. The question is whether parol evidence is to be admitted to vary the terms of a written contract. While following the decisons of the Courts of the respective states in proper cases, this Court has never gone so far as to hold that the decisions of state Courts on a question of this kind must be followed in the federal Courts.

2. There has been no decision of the Supreme Court of Pennsylvania pointed out in which this precise form of contract has been construed. There is no decision in the State of Pennsylvania which justifies the admission of evidence outside of the contract under the facts of this particular case. The only decision in the State of Pennsylvania construing the expression "other explosives" as used in a similar form of policy is the case of Lutz v. The Royal Ins. Co., 205 Pa. 159, in which a much broader construction was placed upon those words than is contended for by the petitioner, and the Court held that flash-light powder was included within the expression "other explosives" where it appeared that it was an explosive of sufficient explosive force to be exceedingly dangerous to life and property, without regard to any comparison between its explosive force and that of other substances specifically described in the policy.

In the Case of Commonwealth Mutual Fire Insurance Co. v. Huntzinger, 98 Pa. St. 41, the court held that a warranty against other insurance was not waived because the agent issuing the policy knew of the existence of other insurance when the policy was delivered.

If there be any law of Pennsylvania which is to be read into this contract it should be the statute in substance declaring the blasting powder used by miners to be a high explosive, dangerous to life and property.

IV.

IF THIS CONTRACT DID NOT EXPRESS THE REAL INTENTION OF THE PARTIES AS IT WAS WRITTEN, THE REMEDY OF THE PETITIONER WAS TO SEEK ITS REFORMATION IN EQUITY.

It is manifest that the contract as written did not authorize the use of these premises for miners' dwellings, with the right to keep blasting powder upon the premises.

No doubt exists as to the meaning of the contract as written. If any doubt is raised by the extrinsic evidence admitted, that doubt is not as to the meaning of the language which the parties used, but at most is a doubt as to whether they wrote the contract as they intended it should be written.

This is almost conceded by the petitioner in her petition for re-argument in the Court below, where she says:

> "If the words 'other explosives' included blasting powder * * * then he (the agent) made one of two mistakes in making this contract of insurance, namely: In misinterpreting his own contract in that he believed its terms did not bar the storage of blasting powder, or if it did bar the storage of blasting powder he neglected to make the endorsement on the policy as required by the contract." (p. 97).

If it were the mutual intention of the insured and the insurer that the premises should be used for this purpose then the contract does not express that intention. The petitioner brought an action at law upon the contract as written, and then attempted to vary or alter its provisions by showing an intention not therein expressed. It may well be doubted whether such evidence as was offered on behalf of the petitioners, even if undisputed, would be sufficient to effect a reformation of this contract, but in any event she has mistaken her remedy.

A sequel to the case of Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, is found in the case of Northern Assurance Co. v. Grand View Building Association, 203 U. S. 106, where the insured, after being defeated in an action at law in an attempt to vary the terms of the contract as written, afterwards successfully prosecuted a suit to reform the policy. In an action at law upon the contract as written the defendant had a right to assume that no parol evidence could be received to vary the terms of this contract. The fact, therefore, that it did not

produce any evidence to contradict that offered by the plaintiff is sufficiently justified. In a suit for reformation of the contract the extent to which the written contract is alleged to differ from the actual contract should be charged in the petition, notice given of the alleged discrepancy, and the defendant given an opportunity to prepare and introduce evidence. In cases of this character instead of permitting an insured to introduce evidence in an action at law to vary the language of the written contract, he should be required to bring a suit to reform it.

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waived and expressly provides against modification by customs of trade or manufacture or by agents, and are unambiguous, courts cannot admit parol testimony to alter the written words of the contract. *Northern Assurance Company* v. *Grand View Building Association*, 183 U. S. 308.

151 Fed. Rep. 961, affirmed.

THE facts, which involve the liability of a fire insurance company on a policy of insurance, are stated in the opinion.

Mr. A. J. Truit, with whom *Mr. Frederic D. McKenney* and *Mr. B. M. Clark* were on the brief, for petitioner:

The action is governed by the law of Pennsylvania. 22 Am. & Eng. Ency. of Law, 1349; *Mann* v. *Salsberg*, 17 Pa. Super. Ct. 280; *Musser* v. *Stauffer*, 192 Pa. St. 398; Judiciary Act of 1789, c. 20, § 34. The knowledge and act of an insurance company's local agent connected with the risk is the knowledge and act of the company itself. *Caldwell* v. *Fire Assn.*, 177 Pa. St. 492; *Davis* v. *Insurance Co.*, 5 Pa. Super. Ct. 506, 512; *Phila. Tool Co.* v. *British Am. Assurance Co.*, 132 Pa. St. 236; *People's Ins. Co.* v. *Spencer*, 53 Pa. St. 353; *Humphreys* v. *Nat. Ben. Assn.*, 139 Pa. St. 264.

Evidence is admissible to show the understanding and intent of the parties and the customs connected therewith at the time the insurance was contracted. *Graybill* v. *Fire Ins. Assn.*, 170 Pa. St. 75; *Lancaster Co.* v. *Fire Ins. Co.*, 170 Pa. St. 151; *W. & A. Pipe Lines* v. *Insurance Co.*, 145 Pa. St. 346; *Helme* v. *Phila. Life Ins. Co.*, 61 Pa. St. 107; *Pittsburg Ins. Co.* v. *Frazee*, 107 Pa. St. 521; *Lutz* v. *Insurance Co.*, 205 Pa. St. 159; *Machine Co.* v. *Insurance Co.*, 173 Pa. St. 53; *Bently* v. *Insurance Co.*, 191 Pa. St. 276; *McCaffery* v. *Knights of Columbia*, 213 Pa. St. 609.

Where a policy of insurance is susceptible without violence of two interpretations that which is more favorable to the insured should be adopted. *Teutonia Fire Ins. Co.* v. *Mund*, 102 Pa. St. 94; 16 Am. & Eng. Ency. of Law, 862; 17 Am. & Eng. Ency. of Law, 25. The expression in a contract of one or

more things of a class implies the exclusion of all not expressed though all would have been implied had none been expressed. *Higgins* v. *Eagleton*, 13 Misc. (N. Y.) 223; *S. C.*, 68 N. Y. St. 82; *O'Niel* v. *Van Tassel*, 137 N. Y. 297; *Cree* v. *Bristol*, 66 N. Y. St. 518; *Hummerquist* v. *Swensson*, 44 Ill. App. 627.

Facts of public notoriety relating to the subject of a contract must be presumed to have been known to the parties. *Woodruff* v. *Woodruff*, 52 N. Y. 53; *McMillen* v. *Titus*, 222 Pa. St. 500.

The burden is on the insurance company to prove the existence of the condition and its violation. 16 Am. & Eng. Ency. of Law, 955; *Dougherty* v. *Insurance Co.*, 154 Pa. St. 386.

A parol waiver by an agent of the insurer of a condition of the policy is binding on the insurer. *Coursin* v. *Pa. Ins. Co.*, 46 Pa. St. 323; *McFarland* v. *Kit. Ins. Co.*, 134 Pa. St. 590.

The burden was on the insurance company to show that blasting powder, which was not among the prohibited articles named in the condition, was of the same nature, as dangerous and inflammable, as dynamite and gunpowder, and if the same as gunpowder that a quantity in excess of twenty-five pounds was kept on the premises.

There was no proof that benzine was of like nature with camphene or spirit gas. It is not a matter of which the court will take judicial notice. It is a question of fact, to be found by a jury upon evidence. *Mears* v. *Humboldt Ins. Co.*, 92 Pa. St. 15, 19; *Wood* v. *Northwestern Ins. Co.*, 46 N. Y. 421.

The universal rule of legal construction and interpretation is that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality. *Sandinan* v. *Breach*, 7 B. & C. K. B. Reps. 100; *Brooks* v. *Lord Kensington*, 14 Eng. Ruling Cases, 723; *Alabama* v. *Montague*, 117 U. S. 602; *United States* v. *Celluloid*, 82 Fed. Rep. 627; *Newport &c. Co.* v. *United States*, 61 Fed. Rep. 488; *Crystal Sp. Distillery Co.* v. *Cox*, 49 Fed. Rep. 555;

Erwin v. *Jersey City*, 60 N. J. L. 145; *Livermore* v. *Camden County*, 29 N. J. Law, 247; *King* v. *Thompson*, 87 Pa. St. 369; *Renick* v. *Boyd*, 99 Pa. St. 555; *Pardee's App.*, 100 Pa. St. 412; *Bucher* v. *Commonwealth*, 103 Pa. St. 528.

Mr. William D. Mitchell, with whom *Mr. W. K. Jennings*, *Mr. D. C. Jennings*, *Mr. Jared How*, *Mr. Pierce Butler* and *Mr. George Hoke* were on the brief, for respondent:

To keep, use or allow blasting powder upon the premises was clearly prohibited by the terms of the written contract, and no application of the rule of *ejusdem generis* can exclude blasting powder from the words "other explosives" in the policy. *Renick* v. *Boyd*, 99 Pa. St. 555; *United Ins. Co.* v. *Foote*, 22 Ohio St. 340. See statutes, 1 Mass. Rev. Laws, 1902, p. 880, c. 102, § 105; So. Car. Civ. Code, 1902, § 2156.

A violation by a tenant has same effect as violation by the insured. *L'pool & Lon. & Globe* v. *Gunther*, 116 U. S. 113; *Diehl* v. *Insurance Co.*, 58 Pa. St. 443.

The condition included even a temporary presence of the prohibited article. 180 Pa. St. 257. Extrinsic or parol evidence is not admissible to alter the meaning of the written contract. *Northern Ins. Co.* v. *Grand View Assn.*, 183 U. S. 308; *West. Assn. Co.* v. *Rector*, 85 Kentucky, 294; *Citizens' Ins. Co.* v. *McLaughlin*, 53 Pa. St. 485, distinguished, and see *McKeesport Co.* v. *Insurance Co.*, 173 Pa. St. 53; *Lutz* v. *Royal Ins. Co.*, 205 Pa. St 159.

The question in the case is not governed by the decisions in the State of Pennsylvania. *Commonwealth* v. *Huntzinger*, 98 Pa. St. 41. If the contract did not express the real intention of the parties as written the petitioner's remedy is to seek its reformation in equity. *Nor. Ins. Co.* v. *Grand View Assn.*, 203 U. S. 106.

Mr. Justice McKenna delivered the opinion of the court.

This is an action to recover the sum of $2,600, with interest, upon a fire insurance policy for the value of a building de-

stroyed by fire. The action was brought in the Court of Common Pleas of Jefferson County, Pennsylvania, and by the insurance company, the respondent herein removed to the United States Court for the Western District of Pennsylvania.

Plaintiff's statement, to use the local name for her pleading, alleged a contract of insurance whereby the insurance company insured, for the term of three years, against direct loss by fire, "a two-story shingle-roofed building, 28 x 96, and additions," etc., to be occupied by tenants as dwellings, and situated in Punxsutawney, Jefferson County, Pennsylvania. Payment of the premium and charges was alleged, also the total loss of the building by fire. A copy of the policy was attached to the statement and made a part of it. The policy contained the following covenant:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 lbs., in quantity, naphtha, nitro-glycerine, or other explosives."

The policy also contained the following covenant:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."